Quality Control for New Rights in International Human Rights Law: A Case Study of the Right to a Good Environment

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I. Introduction

The significant moral and normative force which comes with asserting that a particular social claim is a 'human right' has led to a variety of interest groups and organisations employing human rights rhetoric in advocating for social, legal or political change. In many cases this is manifested in the declaration of new rights without their having passed through the usual law-making processes. While this technique has proven successful for mobilising public support, it can lead to confusion about whether a particular human right exists in international law, and it could have the consequence of diminishing the status of human rights as a whole.[1]

At the same time, it is essential that human rights law be adaptable to changing international issues and emerging threats. While human rights law has its foundations in rights theory going back several centuries, it ought not be confined to those traditional notions, and States should be free to develop and expand the law into new areas. However, law-making bodies must exercise caution in the expansion and development of human rights law, especially given the pressure they may face from NGOs and other interested parties seeking to utilise the value of human rights language to advance their objectives. That same value can be undermined by indiscriminate and uncritical expansion of human rights to encompass new claims. It can also be compromised where so-called new rights are in fact merely reiterations of existing rights.

In order to illustrate these issues, this paper takes as a case study the right to a good environment. In the context of the significant global environmental crisis presently confronting us after centuries of consumption and growth, and given the certainty that our damage to the planet will continue to be felt for generations to come, legal recognition that a good environment is among humans' fundamental

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1 Philip Alston, 'Conjuring Up New Rights: A Proposal for Quality Control' (1984) 78(3) *American Journal of International Law* 607; Philip Alston, 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 *Harvard Human Rights Yearbook* 3; Stephen P Marks, 'Emerging Human Rights: A New Generation for the 1980s?' (1981) 33 *Rutgers Law Review* 435, 436; B G Ramcharan, 'The Concept of Human Rights in Contemporary International Law' (1983) *Canadian Human Rights Yearbook* 267.

entitlements has obvious appeal. The concept of a right to a good environment has been the subject of scholarly debate since it was included in the *Stockholm Declaration on the Human Environment* in 1972.[2] It has been picked up by numerous authors and interest groups seeking to strengthen action on both human welfare and environmental protection.[3] While the literature includes a number of variations in terminology, including a right to a safe environment,[4] a healthy environment,[5] a healthful environment,[6] a clean environment[7] and a decent environment,[8] these formulations have in common the notion that human beings are entitled to an environment of a certain quality, although in some cases the content and scope of the right are not defined.[9] Versions of the right to a good environment can be found in regional human rights treaties in Africa[10] the Americas,[11] and the Arab world,[12] but it is not included in any of the multilateral United Nations human

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2 Conference of the Parties, *Report of the United Nations Conference on the Human Environment, Held in Stockholm 5-16 June 1972*, UN Doc A/CONF.48/14/Rev 1 (16 June 1972) 3.]

3 See for example, Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stanford Journal of International Law* 103; Luis E Rodriguez-Rivera, 'Is the Human Right to Environment Recognised Under International Law? It Depends on the Source' (2001) 12(1) *Colorado Journal of International Environmental Law and Policy* 1; Jennifer Downs, 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1993) 3 *Duke Journal of Comparative and International Law* 351; Janusz Symonides, 'The Human Right to a Clean, Balanced and Protected Environment' (1992) 20 *International Journal of Legal Information* 24; Tim Hayward, *Constitutional Environmental Rights* (Oxford University Press, 2005); Philippe Cullet, 'Definition of an Environmental Right in a Human Rights Context' (1995) 13 *Netherlands Quarterly of Human Rights* 13; Michael Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon, 1996).

4 James W Nickel, 'The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification' (1993) 18 *Yale Journal of International Law* 281.

5 Sueli Giorgetta, 'The Right to a Healthy Environment, Human Rights and Sustainable Development' (2002) 2 *International Environmental Agreements: Politics, Law and Economics* 173.

6 Ryan K Gravelle, 'Enforcing the Elusive: Environmental Rights in East European Constitutions' (1997) 16 *Virginia Environmental Law Journal* 633.

7 Symonides, above n 3.

8 Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon, 1996) 43.

9 Rodriguez-Rivera, above n 3, 9-10.

10 *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 21 ILM 59 (entered into force 21 October 1986) art 24.

11 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, opened for signature November 17 1988, OAS Treaty Series No 69 (entered into force November 16 1999) art 11.

12 *Arab Charter on Human Rights*, opened for signature 22 May 2004**,** reprinted in (2005) 12 *International Human Rights Report* 893 (entered into force 15 March 2008) art 38.

rights conventions.[13] There have been ongoing calls for its wider recognition within international law.[14] This paper identifies a number of risks associated with the uncritical expansion of human rights, and argues that the right to a good environment should be carefully examined to determine its suitability for recognition in international law. The paper identifies various considerations which are relevant to such an assessment. It first looks to human rights theory to identify the sorts of claims which are appropriate for recognition as human rights. It then draws on a range of normative, practical and political considerations, which are relevant to the question of whether the proposed right could be effectively implemented and enforced. Together these considerations can be taken as a set of guiding principles or criteria.

After examining the right to a good environment against these criteria, the paper concludes that recognition of the right to a good environment cannot be justified and that international attention should instead focus on improving the application of existing rights to environmental issues. In examining the right to a good environment, the paper contributes to the discussion on the expansion of human rights law more generally, and identifies a number of significant issues which must be considered when balancing the need for dynamism against the need to retain that which makes human rights such a powerful area of law.

II. The need to balance dynamism and proliferation in international human rights law

In 1969 Bilder recognised that '[t]o assert that a particular social claim is a human right is to vest it emotionally and morally with an especially high order of legitimacy'.[15] The significant value of having a particular claim designated as a 'human right' has led to a wide variety of interest groups and non-governmental organisations seeking to have new human rights recognised.[16] Alston identified this effect in relation to the emerging right to development in the 1980s. He commented that '[g]iven such perceptions of the potential power of rights rhetoric, it is hardly surprising that claims for the recognition of new human rights have proliferated dramatically in recent years'.[17] This has become a 'time-honoured and proven

13 Burns H Weston and David Bollier, 'Toward a Recalibrated Human Right to a Clean and Healthy Environment: Making the Conceptual Transition' (2013) 4(2) *Journal of Human Rights and the Environment* 116, 117; John H Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Preliminary Report* 22nd sess, Agenda Item 3, UN Doc A/HRC/22/43 (24 December 2012) 6.

14 See for example Cullet above n 3, 25-26; Anderson, above n 3, 8; Melissa Thorme, 'Establishing Environment as a Human Right' (1991) 19(2) *Denver Journal of International Law and Policy* 301, 301; Symonides, above- n 3, 38; Downs, above n 3, 362; Iveta Hodkova, 'Is There a Right to a Healthy Environment in the International Legal Order?' (1991) 7 *Connecticut Journal of International Law* 65.

15 Richard B Bilder, 'Rethinking International Human Rights: Some Basic Questions' (1969) *Wisconsin Law Review* 171, 174.

16 Clifford Bob, 'Introduction: Fight for New Rights' in Clifford Bob (ed), *The International Struggle for New Human Rights*, (University of Pennsylvania Press, 2009)..

17 Alston, 'Making Space for New Human Rights', above n 1, 3.

technique' for mobilising public support around a particular issue, and has been employed by numerous international organisations.[18] Consequently, as D'Amato has identified, '[m]any "rights" have been asserted in print, ranging from the fundamental to the vague, from the consistent to the incoherent'.[19]

Bilder identified the consequences of such an expansion of human rights noting that

> acceptance of the human rights label for some types of social claims while denying it to others implicitly accomplishes a sort of ordering of social values, prejudging which claims and interests are to prevail and which are to be sacrificed when different values come into conflict'.[20]

He suggested that if we allow too many claims to be designated as human rights, the 'usefulness of human rights as an ordering concept may be distorted, diminishing their helpfulness in solving those crucial and recurrent conflicts between competing values which every society confronts'.[21]

Bilder further argued that

> [w]here obviously trivial or highly specialized [sic] claims are included, the dignity and status of the human rights concept are depreciated…[T]he present broad and indiscriminate use of the term "human rights" may obscure what are in fact very different types of social ends and that various human rights may have little in common but their label.[22]

Higgins has warned that the 'coinage' of human rights will 'undoubtedly become debased' if States agree to the expansion of human rights without adequate justification, with the consequence that 'the major operational importance of designating a right a human right – that opprobrium attaches to ignoring it – will be lost'.[23] Alston agrees that 'a proliferation of new rights would be much more likely to contribute to a serious devaluation of the human rights currency than to enrich significantly the overall coverage provided by existing rights'.[24]

The risk that international law will tolerate the overuse of the human rights label, and consequently that the integrity and weight of existing human rights will be undermined, is exacerbated by the uncritical manner in which rights develop within the international system.[25] While many international organisations and

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18 Alston, 'Conjuring Up New Rights', above n 1, 608.

19 Anthony D'Amato, 'The Concept of Human Rights in International Law' (1982) 82 *Columbia Law Review* 1110, 1128. See also Makau Mutua, 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29 *Human Rights Quarterly* 547, 557-58.

20 Bilder, above n 15, 174.

21 Ibid 175.

22 Ibid 176.

23 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 105.

24 Alston, 'Conjuring Up New Rights', above n 1, 614; see also Philip Alston, 'Creating New Environmental Rights Under International Law: Desirability and Feasibility' (Paper presented at Human Rights and Environmental Protection: The Vital Link, University of New South Wales, 12 October 1991); Marks, above n 1, 451.

25 Alston, 'Making Space for New Human Rights', above n 1, 10.

interest groups have sought to have particular claims recognised as human rights, Alston argues that international organisations are 'notoriously unsatisfactory incubators of intellectual ideas'.[26] Where an organisation has identified the recognition of a new right as one of its priorities, 'challenging scholarly analysis' and 'critical propositions' are nearly impossible.[27] Ramcharan argues that when it comes to proposals to recognise new rights,

> [u]nfortunately the debate tends to proceed mostly on the basis of each protagonist's assertions of what he or she considers to be human rights rather than in terms of the criteria available in international law for determining what a human right is and whether an asserted right or category of rights meets those criteria.[28]

The value of the human rights label being attached to a particular interest is so great that advocates will inevitably push for the recognition of a new right without necessarily examining the full implications or inviting critical input from opposing or even neutral analysts. A number of new rights have been declared by various United Nations organs, though Alston has noted several shortcomings in processes through which these rights have been proclaimed.[29] Alston has argued that the concern with new human rights is not their proliferation per se, but the 'haphazard, almost anarchic manner in which this expansion is being achieved. Indeed, some such rights seem to have been literally conjured up, in the dictionary sense of being 'brought into existence as if by magic'.[30]

Despite these concerns, there is nothing to prevent States from recognising a human right to a good environment, or any other human right, should they choose. States, and the international organisations to which they belong, have exercised this power to proclaim new rights in the past, with a number of rights being acknowledged since the initial adoption of the *Universal Declaration of Human Rights* in 1948 and the two International Covenants of 1966.[31]

This ability to recognise new rights is an essential quality of contemporary human rights. Human rights law must be adaptable to changing international issues and emerging threats, and as such some degree of dynamism within the system is necessary. As Ramcharan says,

> [i]t is fallacious to confine the definition of human rights only to traditional categories or criteria. There are ongoing processes of discovery, recognition, enlargement, enrichment and refining, and adapting and updating...It is open to authoritative organs to recognise

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26 Ibid.
27 Ibid.
28 Ramcharan, above n 1, 268.
29 Alston, 'Conjuring Up New Rights', above n 1, 612-613.
30 Alston, 'Conjuring Up New Rights', above n 1, 607. citing *The Concise Oxford Dictionary* (Clarendon, 1976) 214.
31 For example the rights of women and children in the *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) and of children in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

> new rights and to declare or proclaim their existence, particularly if an international consensus exists over the recognition of such a right.[32]

The challenge is to address the need for international human rights law to be responsive to emerging needs and challenges while maintaining the normative force of the concept of human rights by avoiding unnecessary proliferation of new rights.

III. Criteria for New Rights

To assist with this task a number of guiding principles or criteria can be articulated. These are informed by the theoretical foundations of human rights as well as by a range of legal, pragmatic and political considerations, including those put forward by various scholars who have considered this issue.[33] It is acknowledged that the task of identifying substantive criteria for new human rights is not without its problems. Alston identified this issue, arguing that establishing fixed criteria is difficult in an area which is in a constant state of 'evolutionary flux'.[34] But it is argued that it is precisely this tendency towards flux which indicates that some guidelines are required. With this in mind, the following principles are put forward not as mandatory requirements but as guidelines or baseline parameters.

(a) New rights must be independently justifiable

In defining criteria for the admission of new rights, a starting point is to specify that the right must be independently justifiable. This requirement follows from the fact that the purpose of articulating criteria is to avoid the unnecessary proliferation of rights. To do this we must have some concept of when a new right might be necessary. It is argued that a right is not necessary when the same objectives can be achieved through rights which are already recognised in international human rights law. An appropriate candidate for recognition must therefore be something 'new' – something which is not simply a reiteration of existing rights but is independently justifiable. A right which is merely repetitive of existing rights would be redundant, and arguably would contribute to the excessive proliferation of human rights.[35]

Furthermore, the right must have some inherent value. It is not enough to argue that the right is complementary to other rights or instrumental in fulfilling them. Donnelly explained the importance of independent justification when he described the instrumental fallacy in human rights theory. The instrumental fallacy reasons that human beings have a right to anything which is instrumental to or beneficial in

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32 Ramcharan, above n 1, 280-281; see also Mutua, above n 19, 619; Bilder, above n 15, 175; Marks, above n 1, 451.

33 Ramcharan, above n 1; Marks, above n 1; Noralee Gibson, 'The Right to a Clean Environment' (1990) 54 *Saskatchewan Law Review* 5.

34 Alston, 'Conjuring Up New Rights', above n 1, 616. Alston himself attempted to set out possible criteria, as have Ramcharan, above n 1, and Nickel, above n 4, among others.

35 Alston, 'Conjuring Up New Rights', above n 1, 615; Gibson, above n 33, 5; Steve Turner, 'The Human Right to a Good Environment: The Sword in the Stone' (2004) 4 *Non-State Actors and International Law* 277, 299; Theodor Meron, 'Norm Making and Supervision in International Human Rights: Reflections on Institutional Order' (1982) 76(4) *American Journal of International Law* 754, 756.

achieving some other human right. Donnelly argues against this proposition: '[s]imply because *A* requires *x* to enjoy *r* does not entail that *A* has a right to *x*'.[36] New rights must be capable of justification in their own right, not on the grounds that they facilitate the enjoyment of other rights.

With respect to the right to a good environment, in order to conclude that it should be recognised in international human rights law it must be possible to define the right in a way which gives it inherent value without relying on other existing rights, so that it is capable of independent justification. There have been many proposals put forward for recognising a right to environment, but many of these have constructed it as a composite or synthesis right. For example, Rodriguez-Rivera has argued that '[t]he articulation of a human right to environment encompasses a compendium of rights constructed in an effort to protect the environment, as well as human life and dignity'.[37] Downs and Symonides have argued that the right to a good environment is justified because of the mutually supportive relationship between the environment and human rights.[38] Other proposals have defined it as a right to a healthy environment, or an environment which is good for human health or well-being, or which provides the necessary conditions for human flourishing.[39]

Human rights law already guarantees the rights to life, health, food, water and self-determination, and the environmental dimensions of these rights have been increasingly recognised.[40] In his separate opinion in the Gabcikovo-Nagymaros case, Vice-President Weeramantry stated that: 'the protection of the environment is ... a vital part of contemporary human rights doctrine, for it is sine qua non for numerous human rights such as the right to health and the right to life itself'.[41] In line with this understanding of the relationship between the environment and human rights, a growing number of cases have held that environmental degradation

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36 Jack Donnelly, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 *California Western International Law Journal* 473, 485.

37 Rodriguez-Rivera, above n 3, 9.

38 Downs, above n 3, 362, 366, 377-78; Symonides, above n 3, 29.

39 Hayward, above n 3, 11. The right to a 'healthy' environment has been advocated by Giorgetta, above n 5, 181; Hodkova, above n 14; James T McClymonds, 'The Human Right to A Healthy Environment: An International Legal Perspective' (1992) 37 *New York Law School Law Review* 583. Gravelle advocates for a right to a 'healthful' environment, which he argues is one that is good for human health: above n 6, 637.

40 United Nations High Commissioner for Human Rights, *Analytical Study on the Relationship Between Human Rights and the Environment*, 19th sess, Agenda Items 2 and 3, UN Doc A/HRC/19/34, (16 December 2011) paras 64-73; John Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean and Healthy Environment: Mapping Report*, 25th sess, Agenda Item 3 UN Doc No A/HRC/25/53 (30 December 2013); Office of the High Commissioner for Human Rights and United Nations Environment Programme, *Human Rights and the Environment: Rio+20 Joint Report OHCHR and UNEP*, (Background document for OHCHR-UNEP Side Event 'Human Rights at the Centre of Sustainable Development - Honouring Principle 1', United Nations Conference on Sustainable Development, Rio de Janeiro, 19 June 2012).

41 *Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, 91 (Vice-President Weeramantry).

has amounted to a violation of human rights.[42] Furthermore, a number of procedural rights are recognised in international environmental law to ensure that persons affected by environmental decision-making are fully informed about the potential impacts, are able to participate in the process, and are entitled to compensation for environmental harm.[43]

Given that existing rights already have application in situations of environmental degradation, any definition of a right to a good environment which is defined by reference to human well-being would not satisfy the requirement for independent justification, as it would merely duplicate rights which are already protected.

The following sections will outline a number of additional criteria which, it is argued, help to provide 'quality control' in the expansion of new rights. In assessing the concept of a right to a good environment against these criteria it is argued that where a criterion can only be satisfied by defining the right in a way which makes it reiterative of other human rights, then it should be concluded that the criterion cannot be satisfied.

(b) New rights must be compatible with the theoretical foundations of human rights

One of the fundamental questions to be answered when determining whether a proposed right should be recognised in international human rights law is whether in substance it is the sort of thing which is appropriate for inclusion. In assessing this, regard should be had to the philosophical underpinnings of human rights in order to ensure that the rights which are recognised in legal instruments are consistent with the theoretical rationale for human rights.[44] This in turn helps to avoid the risk of

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42 See, for example, *Yakye Axa Indigenous Community v Paraguay (Merits, Reparations and Costs)* (2005) Inter-American Court HR (ser C) No 125; Human Rights Committee, *Communication No 67/1980*, 17th sess, UN Doc CCPR/C/17/D/67/1980 (27 October 1982) 20 ('*Port Hope Environmental Group v Canada*'); Human Rights Committee, *Communication No 645/1995*, 57th sess, UN Doc CCPR/C/57/D/645/1995 (22 July 1996) ('*Bordes and Temeharo v France*); *Yanomami Indians v Brazil (Resolution)* (1985) Inter-American Commission HR (ser L/V/II.66) No 7615; *Sawhoyamaxa Indigenous Community v Paraguay (Merits, Reparations and Costs*) (2006) Inter-American Cout HR (ser C) No 146 [161]; *Budayeva v Russia* (European Court of Human Rights, Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008); *Oneryildiz v Turkey* [2004] XII Eur Court HR 657; *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, (2001) African Commission No 155/96

43 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001); *The Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961); *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, 30 ILM 1461 (entered into force 14 January 1998), Annex II; *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

44 J G Merrills, 'Environmental Protection and Human Rights: Conceptual Aspects', in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1996) 25, 25; Higgins, above n 23.

diluting the strength of existing rights and of international human rights law in general. If the term 'human rights' is neglected on a theoretical level then there is a risk that 'many might fill the gap with notions at odds with the essence of human rights'.[45]

Much scholarly work has been devoted to addressing the question posed by Finnis: what, if any, is the underlying principle unifying the various types of relationships that are reasonably said to concern 'rights'?[46] Countless theories of rights have been expounded over time in an attempt to describe what rights are, who should be entitled to them and how they should function. These theories attempt to explain the philosophical justification of rights (including but not exclusively human rights) and in so doing provide various tests for whether a particular object ought to be called a right. The theories discussed below are not exhaustive, but represent a selection of the major approaches. Possible justifications for the right to a good environment will be considered in relation to each of the theoretical approaches in order to demonstrate that the right cannot be adequately justified under any of the key theories of human rights.

(i) Natural Rights

One of the principal theories advanced as a justification for human rights is natural rights theory. The philosophical heritage of modern natural rights theories can be traced back to Thomas Aquinas, and to early Western philosophers like Thomas Hobbes and John Locke, who developed theories of natural law which held that certain basic principles of moral behaviour can be discerned from human nature, and are not dependent on recognition by the State.

Reflecting the basic principles of natural law, natural rights theory posits that each individual person is entitled to a number of fundamental claims which derive from their inherent human dignity.[47] As Donnelly explains, rights derive from human nature and consist of such things as are essential to the protection and realisation of human nature and dignity, those things which are necessary for the maintenance of a life worthy of a human being.[48]

Natural rights theory continues to play a significant role in contemporary human rights discourse. Many scholars maintain that human rights law developed out of natural rights theory and that it remains the appropriate philosophical justification for modern human rights, such that any new addition to the catalogue of human rights must satisfy the requirements of a natural right.[49] For example,

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45 Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Martinus Nijhoff, 2011), 41.

46 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011), 203.

47 Ibid 272-273; Donnelly, 'In Search of the Unicorn', above n 36, 495-97.

48 Jack Donnelly, 'Human Rights as Natural Rights' (1982) 4 *Human Rights Quarterly* 391, 397.

49 Ibid 403; Alston, 'Making Space for New Human Rights', above n 1, 26-27.

Finnis considers human rights to be the contemporary idiom for natural rights, and he uses the two terms interchangeably.[50]

Donnelly states that international human rights law has incorporated and is based upon the tradition of natural rights.[51] As evidence of this he points to the fact that the UDHR and other prominent human rights instruments refer to the source of human rights as being the inherent dignity of the individual.[52] He argues that in the UDHR 'human rights are unambiguously conceptualised as being inherent to humans and not the product of social cooperation'.[53] He cites article 2 of the UDHR (the terms of which are echoed in article 2 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*) which provides that human rights are guaranteed to all people regardless of race, nationality or social origin.[54] Donnelly argues that these statements confirm that contemporary human rights are natural rights, in that they flow from our existence as human beings, and are not a product of our social cooperation or membership of a community.[55] From this position, Donnelly argues that any right which does not satisfy the requirements of a natural right cannot be considered a human right at all.

In order for the right to a good environment to be justifiable under natural rights theory, a good environment must be viewed as something which is necessary to advance human dignity and a life worthy of a human being. At the same time however, this must be established in a way which does not merely reiterate the relationship between the environment and other rights which are already recognised, in order to ensure compliance with the first requirement of independence.

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50 Finnis, above n 46, 198. But note that Finnis does distinguish human rights as natural rights from the list of rights guaranteed by international human rights law, and suggests that the realm of true human rights is in fact narrower than international doctrine would indicate, at 210.

51 Donnelly, 'Human Rights as Natural Rights' above n 48, 403; Alston, 'Making Space for New Rights', above n 1, 26.

52 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR*'), Preamble: 'Whereas the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' The inherent dignity of the person is also recognised in preambles of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January, 1976) ('*ICESCR*'): 'Recognizing that these rights derive from the inherent dignity of the human person.'

53 Donnelly, 'Human Rights as Natural Rights', above n 48, 401.

54 UDHR art 2; ICCPR art 2; ICESCR art 2. The General Assembly affirmed in 1986 that further development in international human rights law should ensure that new rights are 'of fundamental character and derive from the inherent dignity and worth of the human person,' *Setting International Standards in the Field of Human Rights*, GA Res 41/120, UN GAOR 41st sess, Agenda Item 97, UN Doc A/Res/41/120 (4 December 1986) [4], ('GA Res 41/120').

55 Donnelly, 'Human Rights as Natural Rights', above n 48, 403.

It is not sufficient, for example, to argue that a good environment is necessary because it provides a means of subsistence, an adequate standard of living, economic prosperity or good health. It would also not be enough to argue that the environment has some inherent value which we are morally obliged to protect. We must be able to identify some independent and indispensable contribution that a good environment makes to the pursuit of human dignity. The environment is obviously essential in fulfilling our basic needs for food, water and shelter, and a good environment facilitates our health and livelihoods generally, as well as our social and cultural lives.[56] However, these sorts of justifications would seem to transgress the prohibition on the instrumental fallacy.

Arguments could be advanced that the environment comprises ecosystems, species and natural spaces which have inherent value and which we are obliged to protect. While this would view a good environment as something more than a mere aspiration, imposing upon us a moral obligation to protect other species and ecosystems, the source of that obligation would not appear to be our own human dignity, but rather the inherent value of the environment itself. It would not, therefore, be a sufficient basis from which to describe a human right which is consistent with the requirements of natural rights theory.

One possible solution to this problem relies on a reconceptualisation of human nature so as to view human beings as part of the ecosystem, on an equal footing with other nonhuman species, similar to the view of humans which can be found in the discourse of deep ecology. Deep ecology is a movement in environmental philosophy which posits that 'all organisms and entities in the ecosphere, as parts of the interrelated whole, are equal in intrinsic worth.'[57] Flowing from this, it is held that 'the well-being and flourishing of human and nonhuman life on Earth have value in themselves ... These values are independent of the usefulness of the nonhuman world for human purposes'.[58]

By viewing humans as an integral part of the ecosystem the quality of the environment as a whole could be seen to influence the quality of our lives within it, making the welfare of the environment integral to human dignity and wellbeing. However, this represents a radical departure from the classical concept of natural law, which attributes a special character to human dignity. While natural rights theory does allow for various conceptions of human nature, it is argued that such an

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56 See arguments of Symonides, above n 3, 29; Rodriguez-Rivera, above n 3; Downs, above n 3, 352.

57 Gibson, above n 33, 13, citing Bill Devall and George Sessions, *Deep Ecology* (Gibbs Smith, 1985) 67. See also Arne Naess, 'The shallow and the deep, long-range ecology movement: A summary' in Alan Drengson and Yuichi Inoue (eds), *The Deep Ecology Movement: An Introductory Anthology* (North Atlantic Books, 1995) 3, 3; Catherine Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights', in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon, 1996) 71; See also Warwick Fox, *Toward a Transpersonal Ecology: Developing New Foundations for Environmentalism* (Shambhala, 1990); William Grey, 'Anthropocentrism and Deep Ecology' (1993) 71 (4) *Australasian Journal of Philosophy* 463, 464-465.

58 Devall and Sessions, above n 57, 70.

extreme divergence could not be accommodated within that theory, but would represent some other kind of justification.

It seems therefore that it is not possible to formulate a right to a good environment in a way which satisfies the requirements of natural rights theory. While the environment is clearly essential to our ongoing well-being, and has its own inherent value which we are arguably obliged to recognise and protect, neither of these factors are capable of establishing a good environment as something which is essential to our human dignity, at least not without relying on some already recognised right as an intermediate link. Given that natural rights theory does not support a right to a good environment, we must turn to other possible theories of rights to see if any of them provide a more useful theoretical justification.

(ii) Will Theory

One alternative theory which has been used to explain human rights, and which could provide a philosophical justification for the right to a good environment, is will theory. This theory assumes that rights flow from each individual's ability to choose and exercise free will. As Finnis explains, under will theory, 'the point and unifying characteristic of rules which entail or create rights is that such rules specifically recognise and respect a person's *choice*, either negatively by not impeding or obstructing it … or affirmatively by giving legal or moral effect to it',[59]

One of the principal proponents of will theory, H.L.A. Hart, described rights-holders as 'small scale sovereigns'.[60] According to will theory, to have a right is to have 'the ability to determine what others may and may not do, and so to exercise authority over a certain domain of affairs',[61] The theory has links to Immanuel Kant's critical philosophy, which reasons that a person cannot be used as a means to an end but is an end in him/herself and is entitled to autonomy and dignity as an individual with free will and the capacity for moral choice.[62] For Kant, human autonomy is the source of all laws of nature, and moral rules derive from human reason. From this assertion of human autonomy as the defining human characteristic, will theory suggests that to have a right is to have the ability to limit or direct the actions of others.

There are a number of challenges to establishing a good environment as a human right under will theory. Firstly, it is questionable whether will theory would support any form of collective or solidarity right. The emphasis on human autonomy would suggest that will theory would only accept rights which flow from an individual's inherent free will, and not from any social organisation or relationship.

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59 Finnis, above n 46, 204.

60 H L A Hart, *Essays on Bentham: Studies in Jurisprudential and Political Theory* (Clarendon Press, 1982) 183.

61 Leif Wenar 'Rights' in Edward N Zalta (ed.) *Stanford Encyclopaedia of Philosophy* (Fall 2015 Edition) <http://plato.stanford.edu.au/entries/rights/>

62 Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Allen W Wood trans, Yale University Press, 2002) [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785)].

The enjoyment of the environment clearly has a collective dimension, as it is something that we experience and benefit from in community with other members of society (or other members of the ecosystem). Several authors have supported the idea of a right to a good environment as a solidarity or collective right which, although belonging to individuals, requires collective action to secure their fulfilment.[63] For example, Lee argued that the right should incorporate both individual and collective elements given that some forms of environmental degradation are best understood as group claims.[64] Gravelle has proposed that the right to a good environment might be viewed as a third generation right on the basis that it is 'several steps removed from those fundamental rights which individuals can vindicate'.[65]

It is difficult to reconcile the individual autonomy at the core of will theory with the collective way in which we enjoy and experience the environment. Two possible formulations could be put forward, but in both situations the objective of environmental protection would appear to be undermined. One possibility involves adopting a narrow definition of the environment, viewing it as referring to an individual's localised surroundings, such that one person's actions with respect to their environment would not impact on another's enjoyment of his/her environment. This definition presents two problems however. Practically, the definition ignores the reality of environmental systems. It is not possible to disconnect the elements of the environment and the natural systems and processes which comprise it so as to guarantee that one person's actions will not affect anyone else's rights.

Further, this segmented view of the environment is antithetical to the understanding of the environment and our relationship with it which has prompted calls for the recognition of the right in the first place. It perverts our usual understanding of the environment as comprising interconnected natural spaces, ecosystems and biodiversity, not capable of division into individualised units. By making the environment a thing which each of us has at our own disposal to do with as we choose, this construction would empower individuals to destroy the environment according to their will, rather than strengthen environmental protection for the good of humanity and the environment itself.

A second possible conceptualisation is based on the assumption that our right to a good environment imposes a corresponding duty on the State to protect the environment for the benefit of individual right-holders. Under will theory an individual should be able to waive that right and permit the State to harm the environment. This could arguably be achieved through democratic processes, allowing States to carry out environmentally harmful activities based on the consent they have received from individuals through informed decision-making.

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63 McClymonds, above n 39, 591; also Downs, above n 3, 351, 365 and Symonides, above n 3, 39.

64 John Lee, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283, 297.

65 Gravelle, above n 6, 636.

This conceptualisation allows for an understanding of the environment which is more realistic, as it recognises our common interest in the environment and the interconnectedness of environmental components, but it relies on a more limited construction of individual autonomy. Will theory creates rights and duties based on individual claims, powers, privileges and immunities, and these must be understood as arising from individual will, and not dependent on the State. While the State may be the bearer of duties which correspond to our rights, it is not the only such duty-bearer; other individuals will bear duties as well.

The common concern we all have in the environment ultimately makes it something which cannot be reduced to individualised claims and powers such as are envisaged by will theory. We cannot waive a right to a good environment in the same way as other rights as it does not flow from our autonomy and freedom of choice. The nature of our relationship with the environment suggests that the right to a good environment cannot be satisfactorily explained by a will theory account of human rights.

(iii) Interest Theory

Interest theory offers another alternative explanation for why certain things are considered 'rights'. According to interest theory, rights are those things that human beings are entitled to claim because they are necessary for their well-being or to further their interests. Joseph Raz developed an interest theory of rights, arguing that a person has a right to *x* when *x* is a fundamental interest that is weighty enough to impose obligations on others.[66] As Caney explains, 'we ascribe rights to protect highly valued interests (such as liberty of conscience, association, and expression) and our standard ascription of rights is guided by our account of what persons' most important interests are'.[67]

Feinberg has argued that anything can have rights where it is capable of having interests, that is, where it can have a 'good' or 'well-being' of its own which should be protected by legal or moral rules.[68] From this basis he has argued that animals and future generations can possess rights, but not 'mere things', which have no capacity to have desires or aims.[69] Van Dyke's account of human rights also appears to draw on interest theory as he asserts that rights are things which are essential to the pursuit of our most basic interests and needs.[70] Okin and Miller have also presented similar accounts of human rights which rely on the contribution that rights make to fundamental human interests and needs.[71]

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66 Joseph Raz, *The Morality of Freedom* (Clarendon, 1986) 166.

67 Simon Caney, 'Cosmopolitan Justice, Rights and Global Climate Change' (2006) 19 *Canadian Journal of Law and Jurisprudence* 255, 259; Simon Caney 'Human rights, climate change and discounting' (2008) 17(4) Environmental *Politics* 536.

68 Joel Feinberg, 'The Rights of Animals and Future Generations' (paper presented at the Fourth Annual conference in Philosophy, University of Georgia, 18 February 1971), 5.

69 Ibid 6.

70 Vernon van Dyke, 'Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought' (1982) 44 (1) *Journal of Politics* 21, 23.

71 Susan Moller Okin, 'Liberty and Welfare: Some Issues in Human Rights Theory' in J Roland Pennock and J W Chapman (eds), *Human Rights* (New York University Press,

If the right to a good environment is to be justified according to interest theory we must be able to show that a good environment is necessary to achieving some human interest. At first glance this seems intuitively straightforward: protection of the environment is something which concerns most people and few would argue against the general proposition that a good or healthy environment is preferable to an unhealthy or degraded environment. For example, Hayward has argued that 'an adequate environment is as basic a condition of human flourishing as any of those that are already protected as human rights.'[72] However, if we are to justify the right to a good environment on the basis of interest theory, we need to show that a good environment is in the human interest for some reason other than its instrumental value in achieving other human interests (such as health, subsistence, economic prosperity etc).

The relationship between human beings and the environment is a topic of much discussion and debate. Various theories of environmental ethics have been developed to explain how humans can and should interact with the environment, ranging from strictly anthropocentric to largely ecocentric approaches.[73] It is not feasible here to canvass all the possible arguments for why a good environment is in the human interest. Two examples are examined below to illustrate the difficulty of justifying the right under interest theory.

(iv) Humans have an Interest in Protecting the Environment because It Gives Us Pleasure

It could be argued that humans derive pleasure from the environment and take comfort in knowing that the environment is in good condition.[74] For example, many humans are concerned about the survival of tigers or polar bears in the wild, or the conservation of the Amazon rainforest or the Great Barrier Reef. Those of us who share these concerns would argue that seeing the environment protected is in our interest. However, very few of us would experience any direct or practical change in our lives if tigers or polar bears went extinct, or the rainforest or reef suffered irreparable damage. People who rely on certain species or natural spaces more directly, for example as species to hunt or fish, or as tourism destinations from which they draw a livelihood, would obviously have a more direct relationship, but their interest would then be described as something other than pleasure, and the loss of those species or spaces would implicate other existing rights. For the rest of us, the argument is that we derive pleasure from knowing that the environment is protected because of our concern for its welfare. There are a

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1981) 230, 231; David Miller, *Social Justice* (Clarendon, 1976) 67; See discussion of Okin and Miller in Downs, above n 3, 356.

72 Hayward, above n 3, 11.

73 See, for example, the deep ecology approaches of Naess, above n 57, and Devall and Sessions, above n 57; or the communitarian understanding advocated by Hiskes, through which he advocates for the protection of the rights of future generations: Richard P Hiskes, '*The Human Right to a Green Future: Environmental Rights and Intergenerational Justice'* (Cambridge University Press, 2009).

74 Adapted from Feinberg, 'Animals and Future Generations', above n 68, 8.

number of problems which arise in attempting to transplant our concern for the environment into a right to see it protected however.

First, a distinction needs to be drawn between being interested in the conservation of the environment and having an interest in that outcome sufficient to justify the protection of that interest as a right. For example, I may derive pleasure from playing a musical instrument, but that is not enough justification for declaring a right to play music. Furthermore, concern for the environment, like playing music, is by no means universal. While most people would claim an interest in their immediate environment as it affects them, many people may have no interest in the natural world more generally. Human rights, however, are said to be universal – they are rights which are guaranteed to all people. It seems difficult to justify to a universal right to a good environment based on the concern that only some humans have for it.

(v) Human Beings are Part of a Global Ecosystem which we have an Interest Protecting

Another possible argument for asserting that a good environment is in the human interest draws on the premise of the deep ecology movement that human beings are part of the global ecosystem and therefore have an interest in securing its continued survival. Such an interest would not be limited to the particular human needs which are facilitated by the environment, but would extend to include an interest in the diversity and longevity of the natural world in general.

Reconceptualising humans' relationship with and role within the natural world could work as a way of establishing an interest capable of expression as a right under the interest theory. If we view ourselves as being one part of a larger ecosystem then we would clearly have an interest in the well-being of the system as a whole. However, if we are to view humans as being equal members of the ecosystem, as deep ecologists would suggest, then we would have to extend equal rights to all other members of the ecosystem. This is at odds with traditional human rights doctrines which, for better or worse, place a particular kind of value on being human. It should be noted that for these and related reasons deep ecologists are critical of the proposal to recognise a human right to a good environment, arguing that it wrongly privileges humans over nonhuman species.[75]

There is also the problem of identifying who would be an appropriate claimant where an alleged violation of the right to a good environment had occurred. If our right to a good environment flows from our equal membership in the global ecosystem then we are arguably all potential claimants should environmental destruction occur. Such a limitless class of claimants is unworkable. We could try to limit this class by requiring some special link to the harm in order to establish standing, but that raises the question of whether that nexus could be defined in a way which did not rely on facts which are the subject of other human rights. If the human right to a good environment is to be practically workable then it is argued that some more specific basis for it is required than our equal membership of the global ecosystem.

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75 Redgwell, above n 57.

While on first inspection it seems intuitively obvious that humans have an interest in maintaining a good environment, it is a difficult challenge to explain the precise nature of that interest without resorting to arguments which rely on the importance of environment to the enjoyment of other human rights. Arguments which rely on a general concern for the natural world seem to lack the universal character or specificity necessary to transplant them into a human right. Reasoning based on our equal membership of the global ecosystem seems inordinately broad, creating significant challenges in terms of the legal workability of the ensuing right.

This analysis of the right to a good environment from different theoretical perspectives suggests a number of conclusions. First, it is clear that all theoretical approaches require some link to fundamental human qualities or needs, leading to some similar answers to the question of 'what sorts of things are human rights?' As a consequence of their emphasis on essential human needs and characteristics, the different theoretical approaches consistently reject recognition of new rights which are merely repetitive of existing rights, or which are justifiable only on the basis that they support the fulfilment of other rights.

These two factors – the need for some link to essential human qualities or needs, and the imperative to avoid reiteration or duplication of existing rights – combine to present a significant challenge to the task of seeking to justify a right to a good environment on the basis of current human rights theory. The challenge lies in explaining how a good environment is essential to human dignity, autonomy or well-being without describing our relationship to the environment by reference to existing rights.

Our dependence on the environment as a source of sustenance and natural resources, and its fundamental role in securing our livelihoods and health, and facilitating our social and cultural lives, is undeniable. These aspects of our relationship to the environment, however, are already protected by the rights such as the rights to health, to food and water, to an adequate standard of living and to self-determination, the environmental dimensions of which are increasingly recognised in international law and in human rights jurisprudence. This does not mean that new rights will never be justifiable, but the case study of the right to a good environment demonstrates the difficulty of establishing that a new right is compatible with the underlying theories of human rights.

(c) New Rights Must be Capable of Sufficiently Precise Definition

For a number of reasons, any new right which is recognised within international human rights law must be capable of definition precise enough to enable it to be attainable and capable of enforcement. In his proposal for quality control in the development of human rights law, Alston argued that new rights must be sufficiently precise as to give rise to identifiable rights and obligations.[76] Mutua has reiterated the need for precision, saying that '[v]acuous, rhetorical and vague standards accomplish little ... To be effective, standards must have a clear path for their implementation and enforcement'.[77] Without normative precision, specific

76 Alston, 'Conjuring Up New Rights', above n 1, 615; GA Res 41/120 [4].
77 Alston, 'Conjuring Up New Rights', above n 1, 620.

human rights may offer little practical benefit and may ultimately be little more than symbolic statements of aspiration.

At the same time, however, a particular right may imply different obligations or require special implementation methods in different contexts.[78]

It may not be possible or even helpful to try to articulate all these variables in exact detail. Alston, while advocating normative precision, also points out that in most cases a new right will start off in a rather generalised form and then 'gradually, through a variety of means, greater specificity will emerge.'79 He concludes that while some precision is necessary to give the right meaning, to create identifiable rights and obligations,80 and to make the right susceptible to effective implementation,81 the exact requirements of the right will vary according to the context, and, although a more specified formulation typically emerges, 'recognition of the right usually occurs at a much earlier stage on the basis of a much less sophisticated and far more imprecise formulation.'82 This has been the case for many rights within international human rights law, where treaties express rights in general terms and specific obligations are progressively articulated through the processes of jurisprudence and expert interpretation. As such, it is possible for a new right to be recognised before its full scope and content is precisely identified.

However, Alston stresses the negative consequences of trying to proclaim a new right without sufficient precision. He says that 'time and energy which should be spent focusing on specific proposals is wasted on 'shadow-boxing' or 'phantom-chasing'' in the form of addressing or refuting interpretations of the new right which reflect the worst fears of its opponents rather than the aspirations of the majority of its proponents.83 Also, allowing States too much flexibility in determining their obligations creates significant difficulties for ensuring compliance, and may undermine the objective of the right in the first place. On the other hand, too much specificity in terms of States' obligations may create difficulties in obtaining majority support of States, as will be discussed below. What is required is sufficient precision to enable the scope and content of the right to be understood and for obligations to be identifiable, even if the precise actions required must be determined on a case-by-case basis.84

As well as being defined clearly, a new right must also be capable of implementation. In order to achieve this, the right must first be something which is attainable. A right to something which is unrealistic or impracticable will not be

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78 Ibid; Bilder, above n 15; Alston, 'Conjuring up new rights', above n 1; Alston, 'Making space for new rights', above n 1; Marks, above n 1; Tom Campbell, 'Introduction: Realising human rights' in Tom Campbell, David Goldberg, Sheila McLean and Tom Mullen (eds) *Human Rights: From Rhetoric to Reality* (Basil Blackwell 1986) 1, 4-5.

79 Alston, 'Making Space for New Human Rights', above n 1, 37.

80 Alston, 'Conjuring Up New Human Rights', above n 1, 615.

81 Alston, 'Making Space for New Human Rights', above n 1, 38.

82 Ibid 37.

83 Ibid.

84 Marks, above n 1, 451.

capable of implementation, even though it might be clearly defined with precise obligations and standards.85 The right should also be supported by implementation procedures and structures.86

These factors allow for the right to be constructed in a way which best facilitates its enforcement.87 Mutua has argued that enforceability of obligations is an essential requirement to ensure that States do not simply ratify new human rights without any intention of implementing them.88 He says that many States have a 'trigger-happy' approach to ratification of human rights without any intent of implementing those rights because they regard the enforcement mechanisms as impotent.89

However, it is not essential that the right be defined so precisely that it is justiciable in a court or tribunal. Alston has argued that, under long-standing systems of international human rights law, the practice of supervisions of States' compliance with their human rights obligations has been considered sufficient to satisfy the requirement of enforcement.90 He addresses the strong links between implementation, enforcement and normative precision, arguing that many existing rights lack precision, and the level of specificity which would enable full justiciability is not a necessary requirement for new rights.91

While there is debate about whether justiciability is an essential element of human rights, it is clear that for human rights to be practically meaningful they must be defined with sufficient precision to render them capable of implementation and enforcement in some form. Failing this, while they will remain relevant as a dimension of human dignity, these rights will be of little practical use to those who possess them.

The requirement for some degree of specificity in the definition of new rights can be applied to the right to a good environment. Speaking with respect to the right in 1991, Alston suggested that considerable work needed to be done in defining the component parts and implications of the right.92 It is suggested that a number of key issues need to be addressed if the right to a good environment is to be defined with sufficient precision. The questions which must be addressed include:

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85 Bilder, above n 15; Meron, above n 35; Mutua, above n 19; Marks, above n 1; Nickel, above n 4, 288.

86 Bilder, above n 15, 206; Mutua, above n 19, 613–4; Marks, above n 1, 452; GA Res 41/120.

87 Campbell, above n 78; Bilder, above n 15; Downs, above n 3, 382; Prudence E Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1998) 10 *Georgetown International Environmental Law Review* 309, 361–2; Thorme, above n 14, 331; McClymonds, above n 39, 629; Symonides, above n 3, 35; Paula Pevato, 'A Right to Environment in International Law: Current Status and Future Prospects' (1999) 8(3) *Review of European, Comparative and International Environmental Law* 309.

88 Mutua, above n 19, 573.

89 Ibid; Bilder, above n 15, 206.

90 Alston, 'Making Space for New Human Rights', above n 1, 38.

91 Alston, 'Making Space for New Human Rights', above n 1, 38.

92 Alston, 'Creating New Environmental Rights', above n 24.

- What standard of environmental health or well-being is meant by a 'good environment' and how is it to be measured?
- Are States required to take positive action to repair and restore environmental damage or are they obliged to prevent future damage?
- Are States obliged to prevent third parties or non-State actors from damaging the environment or does the right only relate to the State's own direct conduct?
- To whom would States owe obligations? Is the right to be enjoyed by individuals or groups or both?
- Does the right only relate to an individual's/group's immediate environment or are they entitled to a good environment more broadly?
- How is the right to be balanced against other potentially conflicting human rights, for example the right to an adequate standard of living and other economic, social and cultural rights?

It is clear from the literature is that many of these questions remain largely unsettled. For instance, the issue of whether the right to a good environment should be an individual or collective right remains the subject of debate.93 The nature and extent of States' obligations is something which also requires much more consideration. There is debate within human rights discourse as to the geographic and temporal scope of States' human rights obligations and the extent to which a State would owe obligations to persons outside their territory or control, or to the members of future generations.

There is also much diversity in the literature with respect to the content of the obligations a right to a good environment would entail, with a number of scholars noting the intrinsic ambiguity of the concept of a 'good environment.'94 It is argued that in order for the right to offer something meaningful, it must be defined in such a way that its ultimate goal is something which States can achieve, at least progressively. Further, in order to be capable of implementation, the right to a good environment must be defined in a way which allows it to be balanced against other rights. An absolute standard of environmental well-being would ignore the realities of governments' other obligations, and would therefore be incapable of implementation and unsuitable for inclusions as a recognised human right under international law.

The right should also be defined in a way which allows it to be enforced. In many cases damage to the environment can occur relatively quickly and easily, but cannot as quickly be restored, if at all. A right to a good environment is of little value if States do not implement it in good faith, as once a State violates the right

93 Gravelle, above n 6; Lee, above n 64; McClymonds, above n 39; Hodkova, above n 14.

94 Barry E Hill, Steve Wolfson and Nicholas Targ, 'Human Rights and the Environment: A Synopsis and Some Predictions' (2004) 16(3) *Georgetown International Environmental Law Review* 359, 361; Gunther Handl, 'Human Rights and the Protection of the Environment' in Asbjørn Eide, Catarina Krause, and Allan Rosas (eds), *Economic, Social and Cultural Rights* (Martinus Nijhoff, 2001) 303, 313; Pevato, above n 87, 312, 316.

there may be little which can be done to repair the breach. It is therefore essential that the right be capable of enforcement.

Existing human rights implementation and enforcement mechanisms could be of use in relation to an environmental right. These include periodic reporting by States to a supervisory body or the establishment of a dedicated committee to hear petitions from individuals or groups who allege that their rights have been violated. A process by which an individual or group could bring a complaint to an international human rights tribunal in order to halt an act of environmental destruction would be a useful tool in protecting the right to a good environment (and the environment itself), and would arguably be more effective than supervisory or reporting mechanisms, provided such a mechanism could be activated in a suitably timely fashion.

Ultimately, questions of enforcement and justiciability of a right to a good environment are dependent on how that right is defined, the obligations which it imposes and the standards which apply in discharging those obligations. While it is not essential that every obligation, standard and implementation measure be specifically spelled out, it is argued that at least some consensus is required in relation to the scope and content of a right and the minimum standards attaching to its corresponding duties. If these issues cannot be settled upon then the effectiveness and enforceability of the right are undermined. The extent of debate surrounding the right to a good environment indicates that much remains to be done to clarify the right's scope and content before it would satisfy this requirement.

(d) New Rights Must Have Identifiable Rights-holders and Duty-bearers

A key feature of a legal right is that it is accompanied by corresponding duties, which are borne by a particular entity against whom the right can be claimed.95 Under international human rights law, rights usually entail corresponding obligations on States, although there are also obligations resting with individuals and groups not to exercise their rights in a manner which interferes with the rights of others.96 Right-holders under international law are in most cases individuals, although some rights are considered to be possessed by groups collectively.97

As discussed in the previous section, in order to ensure that a right is meaningful and enforceable it is necessary to define with some degree of precision the obligations which it entails. It is equally important to identify who the bearers of those obligations will be, so that it is clear who may be called upon to ensure that the rights are respected, protected and fulfilled.

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95 Nickel, above n 4, 288; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 115.

96 See, eg, Article 19 of the ICCPR, which protects the right to freedom of thought and expression, but acknowledges that the exercise of this right carries special duties and responsibilities.

97 The best example of a group right is the right to self-determination in Article 1 of the ICCPR and ICESCR. Other possible group rights include the right to development and the rights of indigenous peoples under UN Declaration on the Rights of Indigenous Peoples.

Equally important (but perhaps more problematic, as the example of the right to a good environment will demonstrate) is the task of identifying clearly who the right belongs to. That is, who will be entitled to make a claim against the duty-bearers based on the right in any given situation? To whom do the duty-bearers owe their obligations? Under international human rights law, States typically owe duties to their own citizens or to persons under their jurisdiction or control. While this has traditionally imposed territorial restrictions on the extent of States' human rights obligations, the concept of jurisdiction has been interpreted to mean that States have human rights obligations with respect to any act undertaken pursuant to their authority, including where that act produces effects outside its territory.98 It has also been argued that States owe duties towards future generations to respect and protect their rights, although the operationalisation of these duties presents a number of difficulties.99

Defining the class of persons to whom a State owes an obligation can be more difficult with some rights than others. While it is necessary to be able to ascribe responsibility for each right to an appropriate duty-bearer, it can be problematic if the right is defined in a way that casts either the class of right-holders or the corresponding duty-bearers too broadly, as this may make enforceability of the right difficult.

The examination of theoretical compatibility above revealed some of the difficulties associated with identifying rights-holders and duty-bearers with respect to the right to a good environment. It was argued that it is not feasible to define the right in a way which links it adequately to human dignity, interests or liberty without relying on aspects of our relationship with the environment which are already protected through other human rights. This problem also applies to identifying rights-holders and duty-bearers.

If the right to a good environment is defined independently of other existing rights then the class of potential claimants is very broad, as possession of the right

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98 Ibid, 388; Robert McCorquodale and Penelope Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights' (2007) 70(4) *Modern Law Review* 598, 602; Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9(4) *Human Rights Law Review* 521; *Trail Smelter Case (United States v Canada) (Decision)* (1949) 3 RIAA 1905.

99 See, eg, Joel Feinberg, 'The Rights of Animals and Future Generations' (paper presented at the Fourth Annual conference in Philosophy, University of Georgia, 18 February 1971); E Partridge, 'On the Rights of Future Generations' in D Scherer (ed), *Upstream/Downstream: Issues in environmental ethics* (Temple University Press, 1990) 40; R Elliot, 'The Rights of Future People' (1989) 6 *Journal of Applied Philosophy* 159, 162; Derek Bell, 'Does Anthropogenic Climate Change Violate Human Rights' (2011) 14(2) *Critical Review of International Social and Political Philosophy* 99, 105. On the challenges of enforcing the rights of future generations, see S Tully, 'Like Oil and Water: A Sceptical Appraisal of Climate Change and Human Rights' (2008) 15 *Australian International Law Journal* 213; R S Abate, 'Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Human Rights' (2007) 26A *Stanford Environmental Law Journal* 3.

is not limited only to those persons who have suffered some direct impact. Where environmental harm occurs it would be difficult to identify a person or group with a sufficient interest in the environmental harm to bring a claim, without relying on some other interest or need which is served by the environment. Further, the cumulative nature of environmental harms such as pollution and climate change can make it difficult to identify the appropriate duty-bearer and to describe the geographic and temporal scope of their obligations.

The nature of environmental harm or degradation also necessitates some consideration of the rights of future generations. Hiskes has argued that in order to achieve intergenerational justice we must recognise the rights of future generations to clean air, water and soil, but acknowledges the difficulty in accommodating these rights within existing human rights theory.100 The interests of future generations provide a compelling argument for greater action to protect the environment, and arguably a right to a good environment which does not accommodate the interests of future generations would be extremely limited. However, the interests of future generations do not necessitate the recognition of an independent right to a good environment, given that existing rights are capable of being applied to environmental degradation. Furthermore, including future generations in the class of potential right-holders for a right to a good environment would further exacerbate the difficulties in identifying claimants and duty-bearers outlined above.

(e) New Rights Must be Capable of Attracting Sufficient Political Support

The requirements for admitting new rights to international human rights law cannot be considered in isolation from the political context in which those laws are created. Alston and Marks have both suggested that a requirement of new rights should be that they have a likelihood of receiving broad support from States.101 Without strong support from States, new rights will not progress far in international law, and in a practical sense there may be little point in pursuing new rights which have only a minimal chance of attaining an adequate level of support.

This is not to say that there is no benefit to be gained from advocating for rights where States appear disinclined to support their legal recognition. Positive outcomes may flow from raising awareness and mobilising public support for greater action, even where the particular right is not recognised or complied with by States. Further, a lack of political support is by no means fatal to a proposal to recognise a new right, and where there is potential for States' attitudes to shift over time then advocates for new rights ought not to be discouraged. However, in a context where there are many demands on States to undertake new obligations, it is

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100 These difficulties are not discussed in the present paper in detail, but see Hiskes, above n 73 and Richard P Hiskes, 'The Right to a Green Future: Human Rights, Environmentalism and Intergenerational Justice' (2005) 27(4) *Human Rights Quarterly* 1346.

101 Alston, 'Conjuring Up New Human Rights', above n 1, 615; Marks, above n 1, 451–2; GA Res 41/120 [4].

argued that proposals for new rights should be capable of attracting at least a minimum degree of political support.

Treaty-making is arguably the best tool for creating binding human rights norms, but it can be a slow and difficult process. Mutua has considered the role of various processes and agents in the development of new human rights standards and concluded that many complex factors influence the process of negotiation and consensus building which is antecedent to the recognition of any new human right.102 He has pointed out that that since the end of the Cold War more States have been free to articulate their own positions on a number of international issues. He argues that we are now able to give 'the religious, cultural, or political considerations relevant to a particular State more weight than [was] previously possible.'103 While this inevitably slows the process of treaty negotiation, it has allowed for a greater diversity of ideas and a better consideration of previously marginalised voices.

The centrality of consensus-building in the treaty-making has a significant influence on the content and structure of norms which are proclaimed. Mutua explains that States can adopt a number of practices in order to frustrate the development of a new treaty, including procrastination and procedural delays, artificially prolonging negotiation and drafting processes, entering reservations or denying ratification.104 Bilder has argued that 'the provisions of such conventions often reflect agreement only at the lowest common level. Even at this level, a basic lack of agreement or willingness to be committed may be reflected in deliberately vague standards, crippling exceptions, and numerous escape hatches.'105 So, while a broadening of participation encourages a diversity of voices, it may also force us to settle for standards which are less than ideally effective.

Further, history has shown that States are typically reluctant to sign on for more obligations.106 This can be seen in the kinds of implementation and enforcement measures which are put in place. As Bilder has argued:

Strong implementation procedures necessarily have the effect of reducing the parties' flexibility and increasing their risks in case of noncompliance; and it is not surprising that foreign office officials, aware of future uncertainties and wishing to retain as much flexibility as possible, are reluctant to become committed to them.107

As Bilder says, 'the price for strong procedures in conventions may be nonparticipation by many governments.'108

This attitude on the part of States has the effect of complicating and constraining the human rights development process. While States are cautious about committing themselves to further human rights obligations, they

102 Mutua, above n 19, 549.
103 Ibid 566.
104 Ibid 570.
105 Bilder, above n 15, 206.
106 Mutua, above n 19, 549
107 Bilder, above n 15, 209.
108 Ibid.

simultaneously wish to appear supportive of human rights in general. States will therefore usually couch their opposition in terms of legitimate State interests, such as sovereignty, self-defence or anti-imperialism. As Mutua explains:

> Human rights are a noble ideal, and the only way to credibly confront it – without appearing negative – is by putting it up against another equally noble ideal. It is this public relations game that has turned the human rights crusade into a sport of organized politics within the corridors of the United Nations.109

Any proposed new right will be destined to fail if it cannot attract at least a basic level of State support. In turn, the reality of States' attitudes has a direct effect on the way that new rights will ultimately be defined and structured. With respect to the right to a good environment, the primary concern for States is likely to be the extent to which the right imposes positive obligations on them or restricts potential development activities or economic growth.

Many national constitutions include reference to environmental rights and duties, suggesting that there is some level of State support for the concept of a right to a good environment.110 However, an examination of the content, structure and context of the various constitutional provisions which purport to guarantee a right to an environment reveals that most provisions link environmental well-being to human interests in some way, rather than creating a truly independent right. Many of the provisions are not justiciable or otherwise enforceable, suggesting that, while States are content to recognise the importance of the environment in a constitutional provision, they are reluctant to create binding legal obligations. Further, the wide variety of language employed suggests that States are motivated by a range of different factors and that, even amongst those States which do purport to include an environmental right, it is not possible to discern a consistent approach.

While States have in the past been willing to acknowledge the environmental aspects of existing human rights, because doing so has little real effect beyond their existing obligations, they are unlikely to agree to the creation of new rights where such rights are accompanied by strong implementation or enforcement mechanisms. Weston and Bollier have identified that States' attitudes towards the right to environment, and towards the environment generally, represent the principal barrier to the recognition of the right. They have concluded that 'as long as ecological governance remains in the grip of essentially unregulated (liberal or neoliberal) capitalism – responsible for most of the plunder and theft of our ecological wealth over the last century and a half – there never will be a human right to environment widely honoured across the globe in any official sense'.111

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109 Mutua, above n 19, 573.

110 Dinah Shelton 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?' (2006) 35(1) *Denver Journal of International Law and Policy* 12; James May, 'Constituting Fundamental Environmental Rights Worldwide' (2006) 23 *Pace Environmental Law Review* 113; OHCHR Analytical Study, above n 40, [31]; Knox, 'Mapping report', above n 40, 6.

111 Weston and Bollier, above n 13, 118.

While low levels of political support should not on their own be a reason to abandon proposals to recognise a new human right, in the case of the right to a good environment the lack of political will serves to compound the other defects outlined above. Given that much can be done to pursue environmental protection through rights which are already recognised by States, the lack of political feasibility for a new right leads to a conclusion that our efforts should instead focus on better implementation of existing law.

IV. Conclusion

The discussion above has outlined a number of criteria and argued that these should be applied in determining whether to recognise a new right within international human rights law. While the suggested criteria are not (and arguably should not be) mandatory, it is argued that a new right which failed to satisfy any of the requirements ought to be rejected, unless a profound reason could be asserted to justify its inclusion in international human rights law. The proposed criteria draw on the theoretical foundations of human rights, in order to ensure that new rights can be shown to have some connection to the sorts of interests and entitlements that have traditionally been considered worthy of being described as 'rights'. This helps to ensure that the moral and normative weight of human rights generally is maintained.

The criteria also incorporate a number of legal and pragmatic considerations, in recognition of the fact that in adding a new right to international human rights law it will acquire legal status and therefore needs to be capable of enforcement. New rights need to be defined in a way which provides clarity as to who the right-holders and duty-bearers will be, and what the right guarantees and requires.

The proposed criteria also have regard to the political realities of the way in which international human rights law is made. It has been argued that if a concept for a new right is unlikely to attract State support then there may be little point in scholars, NGOS or international organisations continuing to pursue its recognition. States of course remain free to declare any right which they agree to recognise. However, given the risk that uncritical expansion of human rights law could damage the integrity of the system as a whole, it is argued that the other criteria should be used to guide States as to the sorts of things which are appropriate for recognition as new human rights.

The case study of the right to a good environment demonstrates the difficulties which can be present in seeking to have new rights declared. It is concluded that the right to a good environment cannot be defined in a way which satisfies all the proposed criteria. In particular it cannot be defined in a way which would make it independently justifiable on the grounds of human dignity, liberty or well-being which would still be attainable and politically feasible. It is concluded therefore that attempts to recognise a right to a good environment within international human rights law have little prospect of success. Ongoing proposals that the right be adopted only serve to divert attention away from important work that could be done on strengthening and clarifying the relationship between human rights and the environment. Rather than pursue the right to a good environment further, it is recommended that human rights-based approaches to environmental protection

focus on how existing human rights and environmental laws can be better implemented and enforced.